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No. 86-1242

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

CITY OF AKRON, STATE OF OHIO; HEALTH COMMISSION, CITY OF AKRON; HEALTH DEPARTMENT, CITY OF AKRON; C. WILLIAM KECK, as Director of Health of the City of Akron; HAROLD K. STUBBS, as Director of Law of the City of Akron,

Appellants,

v.

OHIO MANUFACTURERS' ASSOCIATION; AKRON SELLE COMPANY,

Appellees.

On Appeal from the United States Court of Appeals for the Sixth Circuit

APPELLANTS' BRIEF IN OPPOSITION TO APPELLEES' MOTION TO DISMISS OR AFFIRM

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Appellees have raised three points in their motion to dismiss or affirm. We respond briefly to each of them.

I. THE FINALITY ISSUE

Appellees contend that the judgment of the court of appeals lacks sufficient "finality" to be appealable under 28 U.S.C. § 1254(2). Nothing in the language of § 1254(2)

suggests that a judgment appealed from under that statute must be "final." The notion that finality is required stems from *Slaker v. O'Connor*, 278 U.S. 188 (1929), which involved a predecessor statute but which the Court cited 17 years later in a *per curiam* order dismissing an appeal under § 1254(2). *South Carolina Gas Co. v. Flemming*, 351 U.S. 901 (1956). In more recent cases, however, the Court has repeatedly indicated that the issue of whether Section 1254(2) requires finality has not been settled. See *Chicago v. Atkinson, T. & S.F.R. Co.*, 357 U.S. 77, 82-83 (1958); *City of El Paso v. Simmons*, 379 U.S. 497, 502 (1965); *Doran v. Salem Inn, Inc.*, 422 U.S. 922, 927 (1975); *City of New Orleans v. Dukes*, 427 U.S. 297, 301-02 (1976).

If the Court finds it necessary to decide the issue in this case, we urge it to hold that there is no finality requirement in Section 1254(2). The fact that finality is expressly required by 28 U.S.C. § 1257, defining this Court's jurisdiction to review the judgments of state courts, and by 28 U.S.C. § 1291, defining the appellate jurisdiction of the courts of appeals, clearly indicates that the omission from Section 1254(2) of any language requiring finality was deliberate. It is also significant that neither Section 1254(1), dealing with review of cases in the courts of appeals by writ of certiorari, nor Section 1254(3), dealing with certified questions from the courts of appeals, contains any requirement of finality.

The Court can avoid deciding this issue, however, by holding, as it did in *City of New Orleans v. Dukes*, *supra*, that the judgment in this case is sufficiently "final" to satisfy any finality requirement that may exist. Here, as in *City of New Orleans*, the fundamental issue raised as to the validity of the challenged local ordinance has been finally decided, and all that remains to be done on remand is the implementation of that decision. It is true, as appellees argue, that the remand in *City of New Orleans* involved only the state law issue of severability, while in

this case there are also some federal issues that remain to be decided. Nevertheless, in this case, as in *New Orleans*, the issues to be decided on remand are separate and distinct from the question that provides the basis for appellate jurisdiction under Section 1254(2)—namely, whether the challenged ordinance is "invalid as repugnant to the Constitution, treaties, or laws of the United States." On that issue, the decision below is final.

In any event, even if the Court were to hold that it lacks appellate jurisdiction to review the judgment below under 28 U.S.C. § 1254(2), there is no question that the Court has certiorari jurisdiction under 28 U.S.C. § 1254 (1). In these circumstances, 28 U.S.C. § 2103 requires the Court to treat the case as if presented on a petition for a writ of certiorari. For the reasons already stated in the Jurisdictional Statement, we believe the issues presented in this case are of sufficient importance to warrant review either on appeal or by writ of certiorari.

II. THE QUESTIONS PRESENTED

Appellees contend that the fiirst issue raised in the Jurisdictional Statement, whether the OSH Act itself preempts the Akron "right-to-know" ordinance, cannot be raised by appellants because it was decided below in their favor. Appellees argue that the only issue that can properly be raised on this appeal is the issue that was decided adversely to appellants: namely, whether the Hazard Communication Standard issued by the Department of Labor preempts the Akron ordinance, and if so, whether the Department has the authority to issue such a preemptive standard.

We discussed both of these issues in the Jurisdictional Statement because we do not see how the second issue can be considered in isolation from the first. This is particularly true with respect to the portion of the second issue that concerns the Department of Labor's *statutory authority* to issue a preemptive standard. In order to determine

the Department's authority, the Court would inevitably be required to consider the extent to which the statute itself either preserves or preempts state and local law. Indeed, appellees themselves discuss this issue at length in the section of their motion that is addressed to the merits.

Moreover, if this Court were to grant plenary review in this case, appellees would undoubtedly want to argue that the result reached below was required not merely by the Hazard Communication Standard but by the statute itself. It was our assumption that the Court would permit that argument, and therefore we thought it appropriate to discuss the issue in the Jurisdictional Statement.

Appellants, however, would have no objection to confining their appeal to the second issue raised in the Jurisdictional Statement if both appellees and the Court wish to limit this case in that fashion. Certainly that issue alone is of sufficient importance both to the development of the law under the OSH Act and, more broadly, to the law of federal preemption, to warrant plenary consideration by this Court.

III. THE MERITS

Most of appellees' motion is addressed to the merits of this appeal. Our views on the merits have already been stated in the Jurisdictional Statement and need not be repeated here. We do wish, however, to make the following comments in response to appellees' arguments.

A. In their argument that the Hazard Communication Standard was intended by the Department of Labor to preempt local right-to-know ordinances, appellees ignore the fact that, at the time the Standard was issued, the Department's view was that the statute *itself* auomatically preempts local laws dealing with any matters that are the subject of a federal occupational safety and health standard. Both courts below have now held that this reading of the statute was wrong, and appellees seem to

have accepted that holding for purposes of this appeal. In these circumstances, appellees' arguments concerning the preemptive "intent" of the Hazard Communication Standard are totally unpersuasive. It is meaningless to talk of "intent" when the agency which issued the standard believed it had no discretion whatever concerning the matter of preemption.

B. Appellees argue that the OSH Act, while admittedly encouraging state regulation of occupational safety and health matters, expresses no similar policy with respect to local regulation. Appellees make no effort, however, to reconcile this argument with this Court's long-established "presumption that state *and local* regulation of health and safety matters can constitutionally coexist with federal regulation." *Hillsborough County, Florida v. Automated Medical Laboratories, Inc.*, 471 U.S. 707, 716 (1985) (emphasis added). Appellees' argument would stand this presumption on its head, and find the requisite statutory intent to preempt local ordinances from the fact that the statute does not expressly preclude such preemption. Moreover, appellees point to nothing in the legislative history of the OSH Act to support their novel argument that the statute was intended to have a greater preemptive effect on local ordinances than on state statutes.

C. Appellees purport to see no difference between a federal agency's authority to preempt provisions of state or local laws which directly conflict with a regulation validity issued by that agency, and an agency's authority to preempt by administrative fiat an entire field of regulation even in the absence of any such direct conflict. We submit that the difference is substantial, and that there is a need for this Court to establish standards for determining when an agency has authority to preempt an entire regulatory field. Contrary to appellees' argument, none of the prior decisions of this Court which involved administrative preemption have addressed this important question.

CONCLUSION

For the reasons stated above and in the Jurisdictional Statement, this Court should note probable jurisdiction of this appeal. If, however, the Court should conclude that the judgment below is not appealable pursuant to 28 U.S.C. § 1254(2), it should treat the Jurisdictional Statement as a petition for a writ of certiorari in accordance with 28 U.S.C. § 2103 and grant the writ.

Respectfully submitted,

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